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February 2, 2016

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VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Expanding the Economic and Innovation Opportunities of Spectrum
Through Incentive Auctions, GN Docket No. 12-268

Dear Ms. Dortch:

On February 2, 2016, Ari Meltzer of Wiley Rein, LLP, on behalf of Latina Broadcasters of Daytona Beach, LLC (“Latina”), participated in a telephonic conference with Erin McGrath, Legal Advisor to Commissioner Michael O’Rielly, pertaining to the eligibility of Latina’s station, WDYB-CD (Fac ID No. 41375), Daytona Beach, Florida (“WDYB” or the “Station”), for protection in the repacking.

Mr. Meltzer explained that Latina’s reliance on the Commission’s repeated statements, beginning on June 9, 2015, that WDYB would be protected not only was reasonable, but that Latina had no reason to believe that it would not or should not be subject to protection.

- The Media Bureau carefully scrutinized WDYB’s eligibility for a Class A license over the course of three-and-a-half years and was familiar with the details of WDYB’s licensing history.
 - On February 15, 2011, shortly after acquiring the Station, Latina filed a displacement application seeking permission to construct a new digital facility for WDYB on in-core Channel 14.¹ Consistent with the then-current guidance from Media Bureau staff, Latina filed this application on a low power Form 346 even though it continued to operate the station as a Class A station.
 - On May 24, 2011, the Media Bureau sent a letter to WDYB stating that “beginning on the date of its application for a Class A license

¹ FCC File No. BDISDTL-20110215ACR.

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and thereafter, the CBPA requires that a station must be ‘in compliance with the Commission’s operating rules for full power television stations.’”²

- On November 15, 2012, Latina filed its application to formally convert its licensed facility to Class A status (following the guidance provided by the Media Bureau to first license the facility as a low power facility and then convert it to Class A status).³
- Nearly 15 months later, on February 12, 2014, the Media Bureau denied WDYB’s Class A license application, citing the periods of time that the station was silent while it constructed its digital facilities and improperly claiming that the station was not granted Commission authority to remain silent during those periods.⁴
- Latina timely petitioned for reconsideration of the Media Bureau’s decision to deny WDYB a Class A license.⁵ Importantly, the *WDYB License Petition* openly explained that due to the prior licensee’s misunderstanding of the license conversion process, WDYB’s “Channel 28 facility never was licensed and the construction permit expired” and its replacement application “never was constructed.”⁶ Nevertheless, Latina explained that “the Station has operated under the Class A rules for more than 14 years.”⁷

² See Letter from Hossein Hashemzadeh, Deputy Chief, Media Bureau, to Latina Broadcasters of Daytona, LLC (Mar. 24, 2011).

³ FCC File No. BLDTA-20121115ACK.

⁴ See Letter from Barbara A. Kreisman, Chief, Video Division to Latina Broadcasters of Daytona Beach, LLC (Feb. 12, 2014), available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=47148.

⁵ See Latina Broadcasters, Petition for Reconsideration (Mar. 24, 2014), available at https://licensing.fcc.gov/cdbs/CDBS_Attachment/getattachment.jsp?appn=101631151&qnum=5000©num=1&exhcnun=1 (the “*WDYB License Petition*”).

⁶ *Id.* at 3-4.

⁷ *Id.* at iv.

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- On October 23, 2014—nearly two years after Latina filed its Class A application—the Media Bureau granted the *WDYB License Petition* and issued WDYB a Class A license.
- Latina had no reason to doubt the FCC’s intention to protect WDYB on June 9, 2015, when the Media Bureau released its first list of protected stations that included WDYB.
 - On November 12, 2014, Latina formally participated in the Incentive Auction proceeding, filing a partial opposition to two petitions for reconsideration.⁸ Although the Commission dismissed the partial oppositions filed by Latina and another party as “late-filed petitions for reconsideration,” it “nonetheless treat[ed] these pleadings as informal comments.”⁹
 - On May 27, 2015, Latina’s representatives participated in a meeting with Bill Lake, Barbara Kreisman, Joyce Bernstein, Michelle Carey, and Dorann Bunkin of the Media Bureau, where they urged the Media Bureau representatives to extend protection to WDYB.¹⁰
 - On June 9, 2015, the Media Bureau released “a complete list of all Class A and full power station facilities eligible for protection in the repacking process and relinquishment in the reverse auction,” which included WDYB.¹¹

⁸ Latina Broadcasters of Daytona Beach, LLC, *Partial Opposition to Petitions for Reconsideration of Abacus Television and The Videohouse, Inc.*, GN Docket No. 12-268 (filed Nov. 12, 2014).

⁹ *Expanding the Economic and Innovation Opportunities for Spectrum Through Incentive Auctions*, Second Order on Reconsideration, 30 FCC Rcd. 6746 ¶ 53 n. 183 (2015) (the “*Second Order on Reconsideration*”).

¹⁰ See Letter from Kathleen Kirby, et al. to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252 (May 28, 2015).

¹¹ See *Media Bureau Announces Incentive Auction Eligible Facilities & July 9, 2015 Deadline for Filing Pre-Auction Tech. Certification Form*, 30 FCC Rcd. 6153 (2015). The Commission explained in a footnote that the list was not intended to pre-judge the outcome of the pending petitions for reconsideration of the *Report and Order*.

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- Two days later, on June 11, 2015, Latina’s representatives participated in a series of meetings, including one with Bill Lake, Barbara Kreisman, Michelle Carey, Hossein Hashemzadeh, Mary Margaret Jackson and Dorann Bunkin of the Media Bureau, Gary Epstein and James Wiley of the Auction Task Force, and Bill Scher and David Konczal of the Office of General Counsel.¹² At that meeting, staff indicated that the inclusion of WDYB on the June 9 list was indicative of the approach proposed in the *Second Order on Reconsideration*, which was then on circulation.
- The Commission confirmed WDYB’s protected status in the *Second Order on Reconsideration*, which extended protection to stations “that hold a Class A license today and that had an application for a Class A construction permit pending or granted as of February 22, 2012.”¹³ WDYB indisputably had not one, but two, Class A construction permits granted as of February 22, 2012. As the attached screenshots demonstrate, the status of those applications remains “Granted” today.¹⁴ Moreover, in its May 24, 2011 letter, the Media Bureau took the position that WDYB remained bound by the certifications in those applications.
- Even if the plain meaning of the phrase “granted as of February 22, 2012” in the *Second Order on Reconsideration* could be something other than had a status of “Granted” on February 22, 2012 (which, logically, it cannot), such an interpretation cannot be reconciled with the rationale presented in that part of the order. As the Commission explained:

By filing an application for a Class A construction permit prior to February 22, 2012, each of these stations documented efforts prior to passage of the Spectrum Act to remove their secondary status and avail themselves of Class A status. Under the Commission’s rules, these stations were required to make the same certifications as if they had applied for a license to cover a Class A facility. Among

¹² See Letter from Kathleen Kirby, et al. to Marlene Dortch, Secretary, FCC, GN Docket No. 12-268, AU Docket No. 14-252 (June 12, 2015).

¹³ *Second Order on Reconsideration* ¶ 53.

¹⁴ See Exhibit A.

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other things, each was required to certify that it “does, and will continue to, broadcast” a minimum of 18 hours per day and an average of at least three hours per week of local programming and that it complied with requirements applicable to full-power stations that apply to Class A stations. Thus, prior to the enactment of the Spectrum Act, such stations had certified in an application filed with the Commission that they were operating like Class A stations.¹⁵

The line the Commission drew in protecting KHTV and WDYB, which each had applications “pending or granted” prior to February 22, 2012, was entirely justified and wholly consistent with this underlying policy rationale. Thus, there was no reason for Latina to believe that a “granted application” meant anything other than a “granted application.” It would belie reason for the FCC to take action at this late date that suggests that the experts within the agency were themselves confused about the Station’s status, but the licensee should have divined that something more was required of it despite the clear instructions of the Commission staff.

- The FCC reconfirmed WDYB’s protected status on three subsequent occasions: (1) when it released the opening prices for all protected stations, including WDYB, and “final” constraint files on October 16, 2015¹⁶; (2) when it revised the baseline data and opening prices for all protected stations, including WDYB, on November 12, 2015;¹⁷ and (3) when it represented to the D.C. Circuit that protection of WDYB was proper because: “[u]nlike petitioners’ stations, WDYB had obtained in-core Class A construction permits before February 22, 2012.”¹⁸

¹⁵ *Second Order on Reconsideration* ¶ 62.

¹⁶ *See Incentive Auction Task Force & Wireless Telecommunications Bureau Release Opening Bid Prices for Reverse Auction*, 30 FCC Rcd. 11358 (2015)

¹⁷ *See Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, DA 15-2296, 2015 WL 7095182 (rel. Nov. 12, 2015).

¹⁸ *See Federal Communications Commission, Opposition to Emergency Petition for Writ of Mandamus, In re The Videohouse, Inc.* 14-1486, at 7-8 & n.2, (D.C. Cir. filed Dec. 28, 2015).

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- The agency's reasoned decision to protect WDYB became final in September 2015, when no timely filed petition for reconsideration challenged the Commission's decision to extend protection to additional Class A stations, generally, or to WDYB, specifically, and the time for *sua sponte* reconsideration by the FCC had passed.¹⁹

Latina is deeply concerned that the FCC is now singling out WDYB for disparate treatment and, in so doing, will cause WDYB to sacrifice the investments that it has made to improve the station and strengthen its service to the Daytona Beach community in reliance on the FCC's prior representations. The Commission was fully aware of WDYB's history when it committed to protect the Station and it cannot now renege on that commitment.

For these reasons, and those stated in its prior submissions in this proceeding, Latina urges the Commission to avoid disturbing its prior determination to afford WYDB protection in the Incentive Auction and repacking process.

Respectfully Submitted,



Ari Meltzer

¹⁹ The 30-day period for seeking reconsideration of the *Second Order on Reconsideration*, which definitively stated an intent to protect WDYB and other similarly situated stations, expired in September 2015 (30 days from the publication of the *Order* in the Federal Register), and none of the petitions that were filed raised any suggestion that the petitioners sought reconsideration of this aspect of the FCC's action. The 30-day period for *sua sponte* reconsideration by the Commission, see 47 C.F.R. § 1.108, expired at the same time.

EXHIBIT A

SCREENSHOTS OF WDYB APPLICATION STATUS IN CDBS

As of February 2, 2016

Application Search Details

File Number:	BLTTA-20010712ABL
Call Sign:	WDYB-CD
Facility Id:	41375
FRN:	
Applicant Name:	TIGER EYE BROADCASTING CORP.
Frequency:	
Channel:	28
Community of License:	DAYTONA BEACH, FL
Application Type:	LICENSE TO COVER
Status:	GRANTED
Status Date:	01/18/2002
Expiration Date:	
Tolling Code:	
Application Service:	CA
Disposed Date:	01/18/2002
Accepted Date:	08/09/2001
Last Public Notice:	01/24/2002
Last Report Number:	45157
Authorization	View Authorization
Engineering Data	View Engineering Data
Legal Actions	View Legal Actions
PN Comment	Public Notice Comment
Correspondence Folder	View Correspondence Folder

Application Search Details

File Number:	BDISTTA-20060922ACY
Call Sign:	WDYB-CD
Facility Id:	41375
FRN:	0006351738
Applicant Name:	TIGER EYE FINANCE INC.
Frequency:	
Channel:	28
Community of License:	DAYTONA BEACH, FL
Application Type:	DISPLACEMENT
Status:	GRANTED
Status Date:	12/02/2008
Expiration Date:	12/02/2011
Tolling Code:	
Application Service:	CA
Disposed Date:	12/02/2008
Accepted Date:	09/25/2006
Last Public Notice:	12/05/2008
Last Report Number:	46877
Authorization	View Authorization
Engineering Data	View Engineering Data
Legal Actions	View Legal Actions
Positional Interest Info	View Positional Interest Info
PN Comment	Public Notice Comment
Correspondence Folder	View Correspondence Folder